STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Bell Telephone Company	:	
	:	**08-0280**
Filing to withdraw unbundled network	:	
elements from the tariffs.	:	
(Tariffs filed on March 14, 2008)	:	

PROPOSED ORDER

I. PROCEDURAL BACKGROUND

On March 14, 2008, Illinois Bell Telephone Company ("AT&T") filed its Ill. C. C. No. 20, Part 19, Section 1, 9th Revised Sheet 1, Part 19, Section 2, 12th Revised Sheet 1, Part 19, Section 2, 2nd Revised Sheet 1, Part 19, Section 16, 4th Revised Sheet 1, Part 19, Section 18, 4th Revised Sheet 1, and Part 19, Section 20, 6th Revised Sheet 1, ("Filed Rate Sheets") proposing to withdraw all unbundled network elements ("UNEs") from its tariffs, effective April 28, 2008.

By an Order dated April 23, 2008, this Commission determined that the Filed Rate Sheets should not take effect and suspended AT&T's proposed withdrawal of UNEs from its tariffs until August 10, 2008. We further held that this docket should proceed to a hearing and decision concerning the propriety of the proposed UNE withdrawal.

Pursuant to notice given in accordance with the law and the rules of the Commission, a duly authorized Administrative Law Judge ("ALJ") conducted a prehearing conference on May 14, 2008 at the Commission's offices in Chicago, Illinois. AT&T and the Commission Staff appeared through legal counsel, as did an intervenor, CIMCO Communications, Inc. ("CIMCO"). During the course of that prehearing conference, all parties agreed that, in lieu of evidentiary hearings, a factual record would be assembled by unanimous stipulation and the parties would file initial and reply briefs (denominated "comments") addressing all disputed legal issues.

On June 5, 2008, Access One, Inc. ("Access"), filed a Petition to Intervene in this proceeding. Access is represented in this case by the same legal counsel as CIMCO.

On June 5, 2008, the parties filed the joint Stipulation of Undisputed Facts ("Stipulation") that constitutes the factual record in this docket. Joint Ex's. 1-6.

On June 18, 2008, each party filed its Initial Comments ("IC"), with CIMCO and Access (collectively, "Intervenors") filing jointly. On July 18, 2008, each party filed its Reply Comments ("IC"), with Intervenors again filing jointly.

On July 30, 2008, the Commission entered an Order resuspending AT&T's Filed Rate Sheets until February 10, 2009.

On August 27, 2008, the ALJ marked the evidentiary record "heard and taken."

An ALJ's Proposed Order was served on all parties on August 28, 2008.

A Brief on Exceptions ("BOE") was filed by XX on September 18, 2008 and a Reply Brief on Exceptions ("RBOE") was filed by XX September 29, 2008.

II. TARIFFS INVOLVED & INTERCONNECTION AGREEMENTS

The tariffs that AT&T proposes to withdraw concern several UNEs – unbundled loops, unbundled interoffice transport, unbundled sub-loops, unbundled dark fiber, Enhanced Extended Loops ("EELs") and Other Non-Switched Combinations of UNEs. If the UNE tariffs are canceled in this docket, "there will no longer be any UNE tariffs in effect" for AT&T in Illinois. Stipulation at 3. AT&T also has filed tariffs with this Commission for switched access (Ill. C. C. No. 21, Section 6), special access (Ill. C. C. No. 21, Section 7) and interconnection (Ill. C. C. No. 2, Part 23, Section 2), which will not be affected by cancellation of the UNE tariffs in dispute here. *Id*.

AT&T is an incumbent local exchange carrier ("ILEC") and CIMCO and Access are competitive local exchange carriers ("CLECs"). Pursuant to provisions in the federal Telecommunications Act of 1996 ("Federal Act")[1], CLECs are entitled to enter into interconnection agreements ("ICAs") with ILECs in order to exchange telecommunications traffic between their respective networks. Pursuant to both the Federal Act and the Illinois Public Utilities Act ("Act"), CLECs have also been entitled to purchase certain UNEs from ILECs for the purpose of providing telecommunications services to CLEC customers. Apart from the disputed tariffs in this case, every CLEC currently purchasing UNEs from AT&T has an ICA "that allows the CLEC to purchase UNEs from [AT&T] pursuant to rates, terms and conditions specified in the ICAs." *Id*. at 2. Moreover, the disputed tariffs provide that a CLEC can purchase UNEs via those tariffs only if it has an ICA with AT&T. *Id*.

III. LAW APPLICABLE TO TARIFF CHANGES; PARTIES' POSITIONS

Section 13-504 of the Act[2] states that "the ratemaking provisions of Article IX of this Act relating to public utilities are fully and equally applicable to the rates, charges, tariffs and classifications for the offer of noncompetitive telecommunications services." Consequently, AT&T's proposed tariff changes here must be in compliance with the procedures and requirements of Section 9-201 of the Act[3], which is a ratemaking provision of Article IX. Under that provision:

[1] 47 USC ¶151 *et seq*.
[2] 220 ILCS 5/13-504.
[3] 220 ILCS 5/19-201.

> If the Commission enters upon a hearing concerning the propriety of any proposed rate or other charge, classification, contract, practice, rule or regulation, the Commission shall establish the rates or other charges, classifications, contracts, practices, rules or regulations proposed, in whole or in part, or others in lieu thereof, which it shall find to be just and reasonable. In such hearing, the burden of proof to establish the justness and reasonableness of the proposed rates or other charges, classifications, contracts, practices, rules or regulations, in whole and in part, shall be upon the utility.

Accordingly, in order to approve the proposed UNE tariff withdrawal and allow the Filed Rate Sheets to take effect, the Commission must find - and AT&T bears the burden of demonstrating - that such withdrawal is just and reasonable.

Staff and Intervenors oppose the proposed tariff cancellation. Their opposition, and AT&T's defense of its proposed cancellation, frame the disputed issues in this proceeding. Those issues concern the impact of a federal court injunction and federal administrative and judicial decisions, the applicability of constitutional provisions that protect contract rights, and the scope of the tariff requirements in the Act.

IV. THE FEDERAL INJUNCTION

Section 13-801 of the Act[4] establishes AT&T's obligation to sell UNEs to CLECs. Under subsection (d), an ILEC:

> …shall provide to any requesting telecommunications carrier, for the provision of an existing or a new telecommunications service, nondiscriminatory access to [UNEs] on any unbundled or bundled basis, as requested, at any technically feasible point on just, reasonable, and nondiscriminatory rates, terms, and conditions.

However, the U.S. District Court, in Illinois Bell Telephone Co. v. Hurley, *et al*., 05 C 1149 (April 17, 2007), enjoined this Commission from enforcing Section 13-801 and any Orders and tariffs implementing that statute, to the extent such enforcement or implementation required AT&T to provide certain UNEs to CLECs. The basis for the federal court's injunction was that this state's regulatory power to require ILECs to supply UNEs to CLECs, as expressed through Section 13-801, was preempted by federal authority, as expressed through Section 251 of the Federal Act[5] and orders of

[4] 220 ILCS 5/13-801.
[5] 47 USC ¶251.

the Federal Communications Commission ("FCC"). AT&T subsequently obtained the Commission's permission to cancel the tariffs offering the pertinent UNEs, in Docket 07-0274, and canceled them on May 5, 2007.

On January 28, 2008, the Hurley court modified and extended its April 2007 injunction, again prohibiting Commission enforcement of Section 13-801, insofar as that section mandated unbundling of the particular UNEs addressed by the 2007 injunction or additional UNEs specifically listed. As a consequence, the Commission can no longer require AT&T to furnish, as UNEs, DS1 and DS3 loops, the dedicated transport associated with such loops, or dark fiber transport, in or between wire centers determined to be unimpaired (under federal criteria[6]) by the Commission, the FCC or a court. Even where there is impairment, AT&T cannot be required to provide the subject UNEs in quantities exceeding applicable federal limits. Also, the Commission is barred from requiring AT&T to supply CLECs with existing combinations of the relevant UNEs.

The Parties do not disagree that the January 2008 federal court injunction relieves AT&T of any state obligation to furnish CLECs with the UNEs specifically described in the preceding paragraph. The Commission concurs. Accordingly, AT&T's request to cancel the tariffs associated with those UNEs should be approved. The remainder of this Order, therefore, will address withdrawal of the other UNEs presently tariffed under the compulsion of Section 13-801 of the Act.

V. UNES NOT SPECIFICALLY ENJOINED BY THE FEDERAL COURT

With respect to the UNEs not specifically addressed by the Hurley injunction, AT&T asserts that the Commission has no legal authority to require that those UNES be offered via tariff. As an implicit fallback position, AT&T suggests that, even if the Commission has such legal authority, it should, for practical and policy reasons, permit tariff withdrawal. Staff and Intervenors take issue with each of AT&T's assertions and additionally, present affirmative arguments in support of Commission power to preclude tariff withdrawal. Intervenors also claim constitutional protection against impairment of purported ICA rights to purchase non-enjoined UNEs from an AT&T tariff. The Commission considers each of these claims below.

A. EFFECT OF THE HURLEY INJUNCTION

AT&T readily acknowledges that it proposes to withdraw tariffs associated with UNEs that are not expressly addressed by the Hurley injunction. AT&T IC at 7. Staff notes that, pursuant to Rule 65(d) of the Federal Rules of Civil Procedure (the rule under which the Hurley injunction was issued), an injunction must specifically describe the acts to be enjoined. Staff IC at 12-13. From that proposition, Staff argues that the Hurley injunction must be interpreted in a manner consistent with the specificity

[6] The impairment concept is derived from the requirement in subsection 251(d)(2)(B) of the Federal Act that the FCC determine whether a CLEC's ability to provide its services to customers would be impaired without access to a particular UNE.

requirement in Rule 65(d) – that is, it must be limited to the actions specifically listed within its four corners. *Id*. at 13.

The federal court did not, in fact, generally enjoin all enforcement of Section 13-801. Rather, it precisely listed the UNEs subject to injunction. Joint. Ex. 2 at 15-16. Moreover, the federal court's underlying rationale for injunction was that Section 13-801 countenances mandatory unbundling of network elements without the showing of impairment required by Section 251 of the Federal Act. *Id*. at 15. When impairment exists, Section 13-801 unbundling is not precluded by the rationale (or the terms) of the Hurley injunction.

Accordingly, the Commission concludes that the Hurley injunction, by itself, does not bar enforcement of Section 13-801 unbundling requirements in all cases. It follows that the Commission is obligated to enforce the mandatory unbundling provisions of Section 13-801 (for impaired UNEs), unless there is some legal impediment, other than the Hurley injunction, to doing so.

B. PREEMPTION BY OTHER FEDERAL DECISIONS

AT&T contends that enforcement of the Section 13-801 mandatory unbundling requirement is fully preempted by federal decisions (other than the Hurley injunction) that interpret the Federal Act. In AT&T's view, the court in Wisconsin Bell Telephone Co. v. Bie, 340 F.3d 441 (7th Cir. 2003) held that "requiring an [ILEC] to tariff UNEs is inconsistent with (and, thus, is preempted by) the [Federal Act's] requirement that UNEs are to be exclusively provided in accordance with the terms and conditions of [ICAs] that are…approved under Section 252." AT&T IC at 10. However, Staff asserts that Bie only "prohibit[s] state Commissions from requiring ILECs to offer tariffed UNEs to carriers which either…do not have [ICAs] or are not entitled under existing [ICAs] to take tariffed UNEs." Staff IC at 15. Intervenors concur with Staff on this point. Intervenors IC at 5.

AT&T counters that Staff and Intervenors ignore the Bie court's perception that *any* UNE tariff requirement would inherently distort the ICA negotiation process, by obliging the ILEC to establish UNE prices outside that process (thus creating a *de facto* price ceiling for negotiations). Furthermore, AT&T avers, the intention of the federal appellate court in Bie is retrospectively illuminated by that court's subsequent opinion in Mpower Communications Corp., *et al.* v. Illinois Bell telephone Company, 457 F. 3d 625 (7th Cir. 2006). In Mpower, the court stated that Bie "holds that states may not insist that ILECs file tariffs for UNEs." *Id*. at 628-29.

Initially, the Commission observes that *Bie* was never cited in any of the federal trial court decisions emanating from the litigation that produced the Hurley injunction[7]. The Hurley court consistently focused on whether Illinois law derogated Section 251 of

[7] In addition to the April 17, 2007 and January 28, 2008 decisions discussed above, the US District Court also issued a decision on September 28, 2006 (granting in part, and denying in part, complainant's summary judgment motion). 2006 U.S. Dist. Lexis 70221.

the Federal Act by requiring unbundling without impairment. The District Court never discussed whether this state's UNE tariff requirement was comprehensively preempted by Bie because it distorted the federal ICA negotiation process. We recognize that the Hurley litigation concerned implementation of Section 13-801 by *any* means, and not merely by tariff. Nevertheless, the District Court could logically have invoked Bie - if the court viewed that precedent as AT&T does here[8] - in support of a blanket preemption of all mandatory UNE tariffing. The absence of any reference to Bie in the District Court's opinions casts doubt on the precedent established in Bie.

The precedential usefulness of Bie is further clouded by the text of the appellate opinion. Bie concerned a state utilities commission order directing an ILEC to "file tariffs setting forth the price and other terms on which [CLECs]…shall be entitled to connect with [the ILEC's] local telephone network." 457 F.3d at 442. Accordingly, the appellate court described the "question presented" in Bie as "whether a state may create an alternative method by which a competitor can obtain *interconnection rights*." *Id*. (emphasis added). Indeed, the court's analysis of the "question presented" did not veer from that its announced focus on "interconnection," which is an obligation imposed on ILECs by subsection 251(c)(2) of the Federal Act. In contrast, the federal "unbundled access" requirement is created by subsection 251(c)(3). Literally, then, Bie appears to preclude mandatory state tariffing for interconnection, not for UNEs.

However, in the US District Court litigation that generated the Bie appeal, the specific question presented, and subsequently appealed, was:

> …whether a state commission can require [ILECs] to provide unbundled access through a tariff, that is, a statement of the fixed terms upon which the [ILEC] will sell *network elements* to any competitor, or whether the [Federal Act] prohibits commissions from requiring incumbents to sell *network elements* by any method other than the negotiated agreements provided for in Section 252 of the [Federal] Act.

Wisconsin Bell, Inc., v. Bie, 01-C-0690-C, 2002 U.S. Dist. Lexis 26901, at 12 (2002) (emphasis added). The District Court's resolution of *that* issue was the ruling affirmed by the Court of Appeals. Therefore, the appellate court's discussion of "interconnection" apparently encompassed unbundled access, and the court's rationale in Bie would apply to UNE tariffs.

That said, though, the appellate court's rationale for preempting UNE tariffs is not the same as the rationale employed by the District Court to reach the same result. The trial court concluded that the state commission's UNE tariff requirement wrongly enabled CLECs to *bypass* the federal framework of negotiated (or arbitrated) agreements between ILECs and CLECs.

[8] Whether AT&T in fact cited Bie to the District Court is not disclosed by the record here.

> [U]nder the regime proposed in this case, the parties *do not agree* that services will be provided pursuant to a tariff. An entrant can opt for the tariff unilaterally without having to reach an agreement with the incumbent. This would violate the FCC's ruling that, if the parties fail to agree, a carrier cannot simply resort to a tariff to solve the disagreement.

2002 U.S. Dist. Lexis 26901 at 21 (emphasis in original).

By comparison, the appellate court in Bie concluded that the state commission's UNE tariff requirement impermissibly *distorts* the mandated federal negotiation process, by establishing a UNE price ceiling.

> The [tariff] requirement *has* to interfere with the procedures established by the federal act. It places a thumb on the negotiating scales by requiring one of the parties to the negotiations, the [ILEC], but not the other, the would-be entrant, to state its reservation price, so that bargaining begins from there.

340 F.3d at 444 (emphasis in original). Under this rationale, it does not matter that the state-mandated UNE tariffs are only available to CLECs with an ICA, because the very existence of the tariff distorts the bargaining that produces the ICA. Thus, the appellate court in Bie articulated a broader preemption principle than did the trial court.

Although they are intended to address the *appellate* decision in Bie, the arguments presented by Staff and Intervenors actually distinguish the *District Court's* opinion from the present case. This Commission limits access to UNE tariffs to those CLECs that have an ICA providing such access. Cbeyond Communications, LLP, et al. v. Illinois Bell Telephone Co., Dckts. 05-0154/05-0156/05-0174 (consol.) Order June 2, 2005, at 32-33, ***aff'd***, Illinois Bell Tel. Co. v. Commerce Comm'n, No 04-05-697 (4th Dist. 2006). As a result, Illinois CLECs, unlike their counterparts in the Bie litigation, cannot bypass the ICA negotiation-arbitration process. But that distinction does not matter in light of the *appellate* opinion in Bie, which preempts state UNE tariffs *even if* the CLEC must first obtain tariff access via negotiation-arbitration.

With respect to determining the meaning of the Federal Act, this Commission is subordinate to the United States Court of Appeals for the Seventh Circuit. While it does appear that the appellate court's rationale both exceeds the factual posture of the case addressed by the trial court (where *bypass* of the federal ICA scheme was an essential element) and articulates a different dispositive principle (distortion versus bypass), that was the appellate court's prerogative. Moreover, as noted above, the Seventh Circuit has explicitly reiterated its Bie rationale in Mpower, *supra ("[f]*orcing ILECs to file tariffs…would unhinge the [Federal] Act's system, we concluded, for it would give the CLECs an extra opportunity," 457 F.3d at 629). Whether or not the foregoing rationale was dictum in Bie or Mpower (or in each), the appellate court's view of the Federal Act

is clear. The Commission perceives no benefit in challenging that view, thereby creating uncertainty for stakeholders and inviting an appeal that is likely to succeed[9]. Under Bie and Mpower, state mandated UNE tariffs are preempted.

C. IMPAIRMENT OF CLEC CONTRACT RIGHTS

Intervenors assert that withdrawal of AT&T's UNE tariff would abrogate the contract right to purchase tariffed UNEs included in the CIMCO-AT&T ICA. According to Intervenors, such abrogation is prohibited by the Contracts Clauses in the United States[10] and Illinois[11] Constitutions. AT&T presents several counter-arguments in response.

However, neither AT&T nor Intervernors pay much attention to whether an act of, or approved by, this Commission is a "law" that has been "passed" within the meaning of each Constitution. The authority cited by Intervenors, United States v. Howard, 352 US 212, 77 S.Ct. 303 (1957), construes the term "law" within the meaning of the Federal Black Bass Act, not the Contracts Clause of the federal Constitution. In Khan v. Gallitano, 180 F.3d 829 (7th Cir. 1999), cited by AT&T, no governmental entity was a party, the "law" involved was a municipal real estate condemnation ruling[12] and the appellate court concluded that plaintiff had failed to properly plead that a legislative act had been "passed." Consequently, the Commission is unwilling to determine, based on the Comments filed here, whether approval of tariff withdrawal constitutes the passage of a law within meaning of the Illinois and federal Constitutions[13]. Further, as the subsequent analysis will demonstrate, it is unnecessary to do so to resolve the instant dispute.

Intervenors state that the CIMCO contract right purportedly abrogated by the attempted withdrawal of AT&T'S UNE tariff appears in Section 5.7.2 of the CIMCO-AT&T ICA:

> If SBC-AMERITECH [AT&T] has approved tariffs on file for interconnection or wholesale services, CLEC may purchase

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[9] As AT&T stresses, the Commission voiced the same concern in Illinois Bell Telephone, Dckt. 00-0393, Order, Sept. 24, 2004 at 56 ("such a [UNE tariff] requirement is unlikely to survive preemption").

[10] "No State shall…pass any…Law impairing the Obligation of Contracts." US Const., Art. I ¶10, Cl. 1.

[11] "No…law impairing the obligation of contracts…shall be passed." Ill. Const., Art. I, ¶16.

[12] To be clear, this ruling was not under appeal in Khan, which concerned a federal civil rights violation claim brought under 42 USC ¶1983, which applies to the actions of persons acting under color of state law.

[13] Similarly, the parties have not addressed the relationship between the Contracts Clauses and the federal judicial decisions preempting enforcement of Section 13-801. At the very least, two critical questions arise from that relationship. First, would the Contracts Clauses nullify the preemptive power of Bie and the Hurley Injunction? (And if the answer is yes, why are Intervenors not recommending that we resist the injunction, which terminates CIMCO's contract rights with respect to tariffed UNEs?) Second, is it really the actions of the federal courts and the FCC, rather than of this Commission, that are altering the pertinent ICA provisions?

> services from SBC-13STATE from this interconnection agreement, the approved tariffs, or both in its sole discretion.

Joint Ex. 3a., p. 40[14].

As AT&T correctly emphasizes, however, the foregoing provision begins with the subjunctive term "if," and, therefore, "contemplates the possibility that such tariffs might not exist." AT&T RC at 19. The Commission agrees. CIMCO's right under the ICA is a conditional right – that is, the right to obtain certain items via tariff *on the condition that* a tariff is on file[15]. If the condition is unfulfilled, there is no right. Moreover, even if Intervenors argued that Section 5.7.2 bars AT&T from withdrawing a tariff already on file (and they do not make that argument), it would make no difference. Nothing in the text quoted above, or in the CIMCO-ATT ICA as a whole, prohibits tariff withdrawal. It follows that Commission approval for tariff withdrawal will not abrogate any right of CIMCO or a similarly situated CLEC.

AT&T also points out that Section 5.7.2 does not expressly refer to tariffs for UNEs in particular. Rather, AT&T notes, that section concerns tariffs for "services," which AT&T contends do not include UNEs. AT&T RC at 18. AT&T apparently presumes that the "services" in Section 5.7.2 are also the "telecommunications services" in Section 13-203 of the Act[16], from which, AT&T believes, UNEs are excluded (an issue addressed in detail below). That is not necessarily the case, however. Whether the "services" in Section 5.7.2 are to be defined by reference to the Act, the Federal Act or the ICA itself is not clear. Moreover, "services" appears twice in Section 5.7.2, once in the conditional clause, as part of "wholesale services," and once in the resulting clause, by itself.

Two things are clear, however. First, although neither "service" nor "telecommunications service" is defined by the ICA, "network element" is defined in Section 1.1.85 ("`Network Element' is as defined in the [Federal] Act"). Joint Ex. 3a, at 18. Since network elements – or at least "UNEs" – are mentioned in Section 5.7.1 of the ICA, but "services" and "wholesale services" are mentioned in Section 5.7.2, it is likely that UNEs are not "services" in the ICA. Second, the term "approved tariffs" appears in both the conditional and resulting clauses of Section 5.7.2 and has the same meaning in both instances. As stated above, it follows that if the *condition* of an approved tariff is not fulfilled, the resulting right to purchase an item – *whether it is a service or a UNE* – does not exist. Consequently, again, tariff withdrawal will not offend the Contracts Clauses.

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[14] The parties state that "[s]ome other ICAs also include this provision." Joint Ex. 1, ¶7. Consequently, references to the CIMCO ICA in this section of our Order include all ICAs with identical provisions.

[15] There are similarly conditional provisions elsewhere in the CIMCO ICA. *E.g.*, "[i]f there is a Commission approved [AT&T] tariffed rate for an item, that rate and associated terms and conditions would apply." Joint Ex. 3a, subsection 5.7(1), p. 40.

[16] 220 ILCS 5/13-203.

Additionally, AT&T stresses that the CIMCO-ATT ICA explicitly contemplates that its terms and conditions may be altered by, among other things, acts by state regulatory agencies. Specifically, AT&T cites Section 21.1 of the ICA:

> In the event that any of the rates, terms and/or conditions herein, or any of the laws or regulations that were the basis or rationale for such rates, terms and/or conditions in the Agreement, are invalidated, modified or stayed by any action of any state or federal regulatory or legislative bodies or courts of competent jurisdiction . . . the affected provision shall be immediately invalidated, modified, or stayed, consistent with the action of the legislative body, court, or regulatory agency upon the written request of either Party.

Joint Ex. 3a, p. 81. Therefore, AT&T maintains, approval of UNE tariff withdrawal would not impair CIMCO's contract rights. To the contrary, the parties' contract, in Section 21.1, anticipates such changes and requires appropriate adjustments when they occur. The Commission agrees and concludes that even if the Contract Clauses would apply to tariff withdrawal, Section 21.1 constitutes another reason why such withdrawal does not impair any CIMCO contract right.

D. UNE TARIFF REQUIREMENTS UNDER STATE LAW

AT&T argues that neither Illinois law nor prior decisions of this Commission require that UNEs be tariffed. AT&T IC at 7. Staff and Intervenors disagree, maintaining that we have both the power and duty to require UNE tariffs. Staff IC at 9; Intervernors IC at 2. In view of our holding, above, that federal authorities have preempted this state's Section 13-801 unbundling requirements, there are no state-mandated UNEs to tariff, whether or not a state tariff obligation exists. Nevertheless, the Commission will address this issue. Unbundling has engendered much litigation since the Federal Act took effect, and the content of applicable law has shifted accordingly. In the event that there is further change, the following discussion will guide the stakeholders' subsequent actions.

Section 13-501(a) of the Act[17] states that no telecommunications carriers (including AT&T):

> …shall offer or provide telecommunications service unless and until a tariff is filed with the Commission which describes the nature of the service, applicable rates and other charges, terms and conditions or service, and the exchange, exchanges or geographical area or areas in which the service shall be offered or provided.

No party disagrees that a service subject to the foregoing statute must be tariffed.

[17] 220 ILCS 5/13-501(a).

AT&T maintains, however, that a UNE is not a "telecommunications service" within the meaning of Section 13-501(a) and that, therefore, there is no tariff requirement for UNEs. AT&T IC at 7. "Telecommunications service" is defined by Section 13-203 of the Act to mean:

> ...the provision or offering for rent, sale or lease, or in exchange for other value received, of the transmittal of information, by means of electromagnetic, including light, transmission with or without benefit of any closed transmission medium, including all instrumentalities, facilities, apparatus, and services (including the collection, storage, forwarding, switching, and delivery of such information) used to provide such transmission and includes access and interconnection arrangements and services.

AT&T principally relies on two precedents that, in its view, exclude UNEs from the foregoing definition of "telecommunications service." First, AT&T cites GlobalCom, Inc. v. Illinois Commerce Commission, *et al*., 347 Ill. App. 3d 592, 806 N.E.2d 1194 (1st Dist. 2004), where the court stated that "Illinois law also defines 'network elements' not as a 'service,' but as a 'facility or equipment used in the provision of a 'telecommunications service.'" 347 Ill. App. 3d at 608. The Globalcom court was referring the specific definition of "network element" in Section 13-216 of the Act[18].

Second, AT&T points to Illinois Bell Telephone Company: Proposed Implementation of High Frequency Portion of Loop (HFPL)/Line Sharing Service, ICC Docket No. 00-0393, Order, March 28, 2002 ("Final Order on Reopening"), in which the Commission noted the assertion of AT&T's predecessor that Globalcom "makes clear that network elements and telecommunications services are distinct under Illinois law." From that, we concluded that the UNEs "at issue in this proceeding are not a 'telecommunications service' as that term is used in Section 13-501 of [the Act]…and on that basis, we find no need for tariffing." *Id*.

In response, both Staff and Intervenors argue that Globalcom's assessment of how UNEs are defined under Illinois law is mere dictum (*i.e.*, a digression from the essential decision-making path in that case) that does not bind this Commission. Staff IC at 11; Intervenor RC at 4. Intervenors add that the Globalcom court distinguished "service," rather than "telecommunication service," from UNEs. Intervenors RC at 4.

Similarly, with respect to the Final Order on Reopening, Intervenors and Staff aver that we expressly limited our conclusions in that Order to the specific circumstances of that case. *Id*.; Staff IC at 22. Indeed, Staff stresses, in the Final Order on Reopening, the Commission specifically stated that we were not addressing the

[18] 220 ILCS 5/13-216 ("'Network element' means a facility or equipment used in the provision of a telecommunications service").

ILEC's Section 13-801 duty to provide UNEs[19]. In effect, Staff and Intervenors recommend narrowly construing both of AT&T's cited authorities so that they are confined to the precise issues resolved by, respectively, the court and this Commission.

Additionally, Staff contends that the definition of "telecommunications service" in Section 13-203 must be interpreted in light of the general definition of "service" in Section 3-115 of the Act[20]. Interpreted thusly, Staff believes, AT&T is engaged in providing "plant, equipment, apparatus and facilities to its competitors, [including] UNEs." Staff IC at 10.

To resolve the parties' dispute on this issue, the Commission finds it useful to identify, for our purposes here, what each state statute cited by the parties does. Section 13-801(d) prescribes what an alternatively regulated ILEC must provide (UNEs). Section 13-216 defines what a UNE is (a facility or equipment used to provide a telecommunications service). Section 13-203 defines what telecommunications service is (information transmission and the means to accomplish such transmission, including access and interconnection arrangements). Section 13-501 determines what must be tariffed (telecommunications service). Thus, under Illinois law (which we hold today to be preempted), AT&T must supply UNEs that are used to provide telecommunications service, which, in turn, must be tariffed. The question, then is whether UNEs – that is, components of tariffed telecommunications service - must be tariffed themselves. That question can also be framed more practically: does the Act require tariffing of what are essentially "wholesale" elements (that is, elements supplied to other carriers) in much the same way it requires tariffing of retail services furnished to end users?

Globalcom does not address or answer that question. Globalcom simply says what the applicable statutes say: a UNE is not a service; it is a component of a telecommunications service. The Final Order on Reopening is more to the point. There, the Commission held that the pertinent UNEs no longer needed tariffing, because the federal mandate to supply those UNEs had changed. In essence, the Final Order on Reopening stepped from the logic of Globalcom (UNEs are not services, but components of Section 13-203 telecommunications services) to the conclusion that UNEs did not require tariffs.

[19] *E.g.*, "the question of whether, and to what extent, Section 13-801 requires [AT&T's predecessor] to offer unbundled access to Project Pronto is not properly at issue in this proceeding." Final Order on Reopening, at 51.

[20] "`Service' is used in its broadest and most inclusive sense, and includes not only the use or accommodation afforded consumers or patrons, but also any product or commodity furnished by any public utility and the plant, equipment, apparatus, appliances, property and facilities employed by, or in connection with, any public utility in performing any service or in furnishing any product or commodity and devoted to the purposes in which such public utility is engaged and to the use and accommodation of the public." 220 ILCS 5/3-115.

Today, the Commission will retrace that step. In the Final Order on Reopening, we considered what is required under Section 13-501. We did not consider what is required under Section 13-505.4(a)[21], which states (with emphasis added):

> A telecommunications carrier that offers or provides a noncompetitive service, service element, feature, or functionality on a separate, stand-alone basis to any customer *shall provide* that service, service element, feature, or functionality *pursuant to tariff* to all persons, including all telecommunications carriers and competitors, in accordance with the provisions of this Article.

UNEs are noncompetitive, and the "service elements, features or functionalities" in subsection 13-505.4(a) encompass the Section 13-216 "network elements" that include the "features, functions and capabilities…used in the…provision of a telecommunications service," within the meaning of Section 13-216[22]. Accordingly, UNEs must be tariffed for CLECs pursuant to Section 13-505.4 and offered without discrimination as directed by the second paragraph of subsection 13-801(a), at the cost-based prices required by subsection 13-801(g) (using the cost-calculation inputs mandated by Section 13-408 of the Act[23]). Tariffs are an essential mechanism for maintaining the cost-based rate uniformity and non-discriminatory availability required for non-competitive services (of which UNEs are a subset). In the Commission's view, that is why the legislature made tariffs mandatory for UNEs, through subsection 13-505.4(a).

Therefore, in the event that the Section 13-801 requirement to provide UNEs were deemed free of preemption, such UNEs would have to be tariffed as required by subsection 13-505.4(a).

VI. CONCLUSION

Although the Act requires that UNEs be tariffed, federal authorities have preempted enforcement of the Section 13-801 requirement that AT&T provide UNEs to requesting CLECs. Specifically, for certain UNEs, the Hurley Injunction enjoins implementation of Section 13-801 pursuant to tariffs, while the Bie and Mpower decisions preempt enforcement of any state tariffs for the provision of UNEs. Additionally, even if the Contracts Clauses in the federal and state constitutions somehow shielded CIMCO's ICA from regulatory changes, that ICA contains no right that would be impaired by UNE tariff cancellation. Accordingly, there is no currently effective Illinois requirement that AT&T provide UNEs to CLECs via tariff. Indeed, under the Bie rationale, such a

[21] 220 ILCS 5/13-505.4.
[22] This finding is consistent with our power under Section 13-505.6 of the Act to "require additional *unbundling* of noncompetitive telecommunications services." 220 ILCS 5/13-505.6 (emphasis added). The unbundling of a noncompetitive service yields the unbundled "service elements" in subsection 13-504.4 (a).
[23] 220 ILCS 5/13-408.

requirement would interfere with implementation of the Federal Act. Therefore, AT&T's proposed tariff withdrawal is just and reasonable and should be approved.

VII. FINDINGS AND ORDERING PARAGRAPHS

The Commission, having considered the entire record and being fully advised in the premises, is of the opinion and finds that:

(1) Illinois Bell Telephone Company (AT&T Illinois) is a "public utility" as defined in the Illinois Public Utilities Act;

(2) the Commission has jurisdiction over the parties and the subject matter of this proceeding;

(3) the findings of fact and conclusions of law reached in the prefatory portion of this Order are supported by the record and are hereby adopted as findings of fact and conclusions of law;

(4) the requirement in Section 13-801 of the Act that AT&T provide UNEs to requesting CLECs is preempted by federal law, as described in this Order;

(5) the requirement in Section 13-801 of the Act that AT&T provide UNEs to requesting CLECs, and the requirement in Section 13-505.4 that UNEs be tariffed, would interfere with implementation of the Federal Act, as described in the appellate decision in Bie;

(6) in view of findings (4) and (5), above, withdrawal and cancellation of the AT&T UNE tariffs that are the subject of this proceeding is just and reasonable;

(7) AT&T's filing to withdraw and cancel the UNE tariffs that are the subject of this proceeding is approved and its revised tariffs shall become effective on February 10, 2009 or within five days of the entry of this Order (whichever comes first).

IT IS THEREFORE ORDERED by the Illinois Commerce Commission that AT&T's filing to withdraw and cancel the UNE tariffs that are the subject of this proceeding is approved.

IT IS FURTHER ORDERED that AT&T's revised tariffs, filed on March 14, 2008, shall become effective on February 10, 2009 or within five days of the entry of this Order (whichever comes first).

IT IS FURTHER ORDERED that any motions, petitions, objections, and other matters in this proceeding which remain unresolved are disposed of consistent with the conclusions herein.

IT IS FURTHER ORDERED that subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill. Adm. Code 200.880, this Order is final, its is not subject to the Administrative Review Law.

DATED: August 28, 2008
BRIEFS ON EXCEPTIONS DUE: September 18, 2008
REPLY BRIEFS ON EXCEPTIONS DUE: September 29, 2008

David Gilbert
Administrative Law Judge